

EXECUTIVE SECRETARIAT

Routing Slip

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2	DDC				
3	EXDIR				
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SUSPENSE		10 September Date			

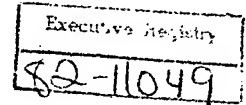
Remarks:

Please coordinate with DDA and prepare response for DCI's signature.

23 August 1982
Date

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2120 L STREET, N.W. SUITE 500
WASHINGTON, D.C. 20037
(202) 254-7020



OFFICE OF
THE CHAIRMAN

August 19, 1982

The Honorable William J. Casey
Director of Central Intelligence
Central Intelligence Agency
Washington, D.C. 20505

Bill
Dear Mr. Casey:

The Administrative Conference of the United States, at its Twenty-fourth Plenary Session on June 17, 1982, adopted Recommendation 82-1: "Exemption (b)(4) of the Freedom of Information Act." The Recommendation was developed by the Conference Committee on Regulation of Business with the assistance of consultants James T. O'Reilly of Cincinnati, Ohio and Russell B. Stevenson, Jr. of the National Law Center, George Washington University. I am enclosing a copy of the Recommendation and the reports of the consultants.

Recommendation 82-1 proposes amendments to the Freedom of Information Act (FOIA), as well as the adoption of certain procedures by federal agencies, that would serve better to protect the legitimate interests of persons who submit valuable confidential information to the agencies. The proposed FOIA amendments would define the scope of exemption (b)(4) and create a judicial cause of action in which a submitter of confidential information could sue to prevent its disclosure under FOIA. Congress is also urged to amend FOIA to require or authorize several agency procedural devices to assure that submitters are given notice of an intended agency release of their information whenever there is a reasonable possibility that the information is covered by exemption (b)(4), and that submitters be provided an opportunity to contest an intended release informally through written submissions.

At the agency level, Recommendation 82-1 contains the following central features:

Notice. Agencies would provide notice to submitters under certain specified conditions whenever a preliminary agency decision has been made to release the submitter's information. (Part B1)

Determination of exempt status. Submitters would be given an opportunity to provide written objections to release, and the agency's final decision would be made on an informal basis. (Part B3)

Final decision to disclose. A final agency decision to disclose information claimed to be exempt under (b)(4) would be made by an agency official of a rank equivalent to that of the official making decisions to withhold under FOIA. (Part B5)

Information handling procedures. Agencies would consider the use of premarking to aid in identifying exempt information, as well as the use of categories of exempt and non-exempt material. (Part B2)

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All of the agency procedural protections addressed by Recommendation 82-1 can be adopted in some form by the agencies without the need for authorizing legislation, and the Recommendation urges the agencies immediately to adopt these procedures to the extent permitted by law. I request your support and cooperation in implementing the Recommendation within the Central Intelligence Agency. I would appreciate your advising me by October 1, 1982 of the Agency's practices in this area and of the steps you are taking or planning to take to comply with the procedures specified in Recommendation 82-1. William C. Bush of my office will be pleased to consult with your staff in the implementation of this recommendation.

Sincerely,



Loren A. Smith
Chairman

Enclosure

*It's good to have the
CIA as part of the
Conference. L.A.S.*

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OFFICE OF
THE CHAIRMAN

Recommendation 82-1

EXEMPTION (b)(4) OF THE FREEDOM OF INFORMATION ACT

(Adopted June 17, 1982)

The Freedom of Information Act (FOIA) allows public access to the records of federal agencies, whether such records are generated by the agencies or obtained by the agencies from other sources, including private individuals. Large numbers of FOIA requests are made by or on behalf of commercial interests seeking to utilize the government's processes to acquire information that has been prepared at the expense of private firms and individuals and submitted to the government as part of a study or pursuant to a regulatory requirement or other government information-gathering program. Often the privately submitted government records subject to FOIA disclosure contain information which will lose value to the submitter if it is disclosed. This availability of FOIA as a tool for low-cost commercial information-gathering—or, in some instances, industrial espionage—needs to be limited.

Exemption (b)(4) of FOIA permits agencies, as a matter of discretion, to withhold trade secrets and commercial or financial information obtained from a person which is privileged or confidential. Although FOIA contains procedural safeguards and a right of judicial review for requesters of agency records, the Act is silent regarding the rights of submitters of information whose legitimate interests may be impaired as a result of public disclosure of their information. Submitters are insecure about the degree of protection their information will receive when it is in the government's possession, and agency collection of private information may be hindered due to reluctance on the part of submitters to trust that the government will not disclose valuable documents.

While the Administrative Conference strongly endorses the FOIA concept of exposure of the government's activities, the disclosure of information created by private persons involves different values. Private needs and public access desires are in conflict in this limited area of FOIA disclosures. Congress should amend exemption (b)(4), both to insure that the private rights of submitters of information are adequately protected and to provide for a more efficient decision-making process within the government for disposing of claims regarding the applicability of exemption (b)(4).

Scope of the Exemption

Information deserving protected treatment under exemption (b)(4) has four characteristics. First, it is "private" information; the records in the government's possession were created by a "person" and submitted to the government, rather than generated internally within an agency.* The information need not be "about" the submit-

* In an instance where one government agency submits analogous information to another agency, the information should be considered "private" for these purposes. A government entity that operates in a commercial, and perhaps highly competitive, marketplace will have interests of the same kind as if it were privately owned, and should receive similar protection.

REGAINING A CONFIDENCE: PROTECTION OF BUSINESS CONFIDENTIAL DATA THROUGH REFORM OF THE FREEDOM OF INFORMATION ACT

James T. O'Reilly*

I. INTRODUCTION

Among current administrative law problems, the subject which is perhaps least understood is the matter of procedural and substantive rights for the private person who submits confidential proprietary information to a federal agency and later learns of the agency's intent to disclose that information. This corner of the Freedom of Information Act (FOIA) seems arcane, even tiny, if one measures administrative law problems by law review pages; many more trees have been pressed into discussions of separation of functions, and much more ink has been expended on termination of federal beneficiaries' payments.

The submitter-disclosure question is fully proper for administrative study, involving property rights, legislative omission, ambiguous statutory text, and great political controversy. In our innovation-based national economy which faces a declining world market position, our society cannot afford administrative systems problems which have real, cash consequences on international balances of trade. Suzuki Motor Company has been an effective collector of Toyota's submissions to the U.S. government in 1981, though neither firm would enjoy access to the other's data in Japan. A food processor which saves tens of

*Lecturer in Law, University of Cincinnati College of Law; Senior Counsel, The Procter & Gamble Company. The views expressed in this paper are based on the author's research undertaken as Consultant to the Administrative Conference of the United States, but the views expressed are solely attributable to the author and not to the Conference or any other institution.

PROTECTING BUSINESS SECRETS UNDER THE FREEDOM OF INFORMATION ACT: MANAGING EXEMPTION 4

Russell B. Stevenson, Jr.*

I. INTRODUCTION

Since the 1974 amendments to the Freedom of Information Act (FOIA)¹ the use of the statute by private individuals and organizations to obtain information in the hands of federal agencies has grown rapidly.² One of the components of the increase in the number of FOIA requests has been a dramatic rise in the use of the Act by business to obtain information from the government submitted to it by other businesses. Indeed, the Act has spawned a mini-industry of firms whose business is the acquisition of information from the government, often information furnished to the government by business.³ As one commentator put it, "It is widely admitted that the statute has become a lawful tool of industrial espionage."⁴ Although the pejorative implica-

*Professor of Law, National Law Center, George Washington University. This article is based on a study for the Administrative Conference of the United States.

¹Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified at 5 U.S.C. § 552 (1976)).

²It is difficult to determine from the readily available statistics how great this growth is. The agency reports to Congress that are required by the Act, 5 U.S.C. § 552(d) (1976), often do not include the total number of requests received by an agency. The experience of the FDA, however, might be taken as representative. It received 13,000 FOIA requests in 1975 and 32,000 in 1979. FDA ANN. REP. FREEDOM OF INFORMATION ACT (1976); FDA ANN. REP. FREEDOM OF INFORMATION ACT (1980). The GAO estimated in 1979 that there were about 154,000 FOIA requests filed in 1975, 156,000 in 1976, and 177,000 in 1977. REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, AN INFORMED PUBLIC ASSURES THAT FEDERAL AGENCIES WILL BETTER COMPLY WITH FREEDOM OF INFORMATION/PRIVACY LAWS 22 (1979).

³See DUN'S REV., Oct. 1976, at 70.

⁴Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109, 113 (1980).